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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PEARLIE MAI HAYNIE, and her counsel,
AVON N. WILLIAMS, JR., ESQUIRE,

Petitioners,

VS.

ROSS GEAR DIVISION OF TRW, INC. and
UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL
IMPLEMENT WORKERS OF AMERICA, LOCAL 342,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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122 pp

QUESTION PRESENTED

Whether extraordinary sanctions can properly be imposed against an attorney under 28 U.S.C. Section 1927 upon an assertion that he negligently "pursued claims he should know are frivolous" when the statutory language requires that the attorney be guilty of "multipl[ying] the proceedings ... unreasonably and vexatiously", particularly when this negligence standard conflicts with an attorney's ethical obligation to present his clients zealously within the bounds of the law and, accordingly, to make good faith arguments for an extension, modification, or reversal of the law.

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

PEARLIE MAI HAYNIE, and her counsel, AVON N. WILLIAMS, JR., ESQUIRE,

Petitioners,

vs.

ROSS GEAR DIVISION OF TRW, INC., and UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 342,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Petitioners[1] respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States

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[1] Petitioners are the plaintiff below, Pearlie Mai Haynie, and her counsel, Avon N. Williams, Jr., Esquire.

Court of appeals for the Sixth Circuit originally entered in this proceeding on August 15, 1986, and finalized by denial of Petitioners' Petition For Rehearing in an Order entered on November 4, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals is reported in 799 F.2d 237 (6th Cir. 1986), and a copy of the slip opinion appears in the Appendix hereto at pp. 1a-12a. The Order denying a rehearing and the decision and judgment of the United States District Court for the Middle District of Tennessee also appear in the Appendix hereto at pp. 12a-13a and 14a-32a.

JURISDICTION

The final judgment of the Court of Appeals for the Sixth Circuit was entered on November 4, 1986, and this Petition For Certiorari was filed within ninety

days of that date. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254(1) (1964).

STATUTES INVOLVED

The statutes involved are set out in the Appendix at p. 33a.

STATEMENT OF THE CASE

Petitioner, Pearlie Mai Haynie, initiated a lawsuit in the United States District Court for the Middle District of Tennessee against Respondents, Ross Gear Division of TRW, Inc. (hereinafter "Ross Gear") and the United Automobile, Aerospace and Agricultural Implement Workers of America, Local 342 (hereinafter "the Union"), alleging that the Respondents were guilty of racial and gender-based discrimination against her, largely predicated upon her discharge by Ross Gear and the Union's investigation and prose-

cution of the resulting grievance. Ultimately, the trial court dismissed all of Ms. Haynie's claims. This adverse decision on the merits was appealed and the Court of Appeals for the Sixth Circuit affirmed the trial court's dismissals.

On December 4, 1985, the trial court issued a decision and judgment awarding the Respondent Ross Gear a $18,287.17 attorneys' fees and costs judgment against Petitioner Haynie under 42 U.S.C., Section 2000e-5(k) and 42 U.S.C., Section 1988. In the same decision, the trial court awarded a joint and several judgment in favor of the Union and against both Petitioners. The portion of the judgment against Ms. Haynie was predicated upon 42 U.S.C., Section 2000e-5(k) and 42 U.S.C., Section 1988. The

portion of the judgment against Petitioner Williams was wholly predicated upon 28 U.S.C., Section 1927.

Petitioners moved the trial court for a new trial and/or to alter or amend the judgments under Rule 59, Federal Rules of Civil Procedure. These motions were denied and Petitioners appealed to the United States Court of appeals for the Sixth Circuit.

On August 15, 1986, a panel of the Sixth Circuit reversed the judgment in favor of Ross Gear[2] and against Petitioner Haynie, affirmed the judgment under 28 U.S.C., Sec. 1927 against Petitioner Williams, and vacated and remanded the portion of the judgment in favor of the

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[2]. For this reason, it appears that Ross Gear does not have an interest in the issues Petitioners seek to have reviewed by this Court.

Union which held that Petitioner Haynie was jointly and severally liable for said judgment for reconsideration in light of her financial condition. The Sixth Circuit, in affirming the personal judgment in the amount of $5,844.50 against Petitioner Williams, construed the language of 42 U.S.C., Sec. 1927 (which expressly provides for extraordinary sanctions against an attorney who unreasonably and vexatiously multiplies judicial proceedings) to encompass Mr. Williams' alleged burdening of the trial court "by pursuing claims that he should know are frivolous." Appendix at 10 (Emphasis Added). On November 4, 1986, the Petitioners' Petition For Rehearing was denied by the Court of Appeals.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH A DECISION OF THIS COURT CONCERNING THE STANDARD FOR IMPOSING SANCTIONS AGAINST AN ATTORNEY UNDER 42 U.S.C., SECTION 1927.

In Roadway Express v. Piper, 447 U.S. 752 (1980), this Court rejected an effort to assess counsel fees against an attorney under 28 U.S.C., Section 1927 upon the ground that the statute, as it read at that time,[3] did not authorize an award

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3. 28 U.S.C., Section 1927, as construed by the Supreme Court in Roadway, supra, was worded, as follow:

> "An attorney or other person admitted to conduct cases in any court of the United States or any territory thereof who so multiples the proceedings in any case as to increase costs unreasonably and vexatiously may be required to satisfy personally such excess costs."

After Roadway, Congress, amended 28 U.S.C., Section 1927 to specifically authorize the assessment of attorneys fees against an attorney who vexatiously and unreasonably multiplies proceedings:

> "Any attorney or other person admitted to conduct cases in any court of the United States or any territory thereof

of counsel fees. After Roadway, supra, Congress amended Section 1927 in to specifically authorize the assessment of attorney's fees against an attorney found guilty of unreasonably and vexatiously multiplying proceedings. Since Roadway, this Court has not squarely addressed the Section 1927 standard, but it is clear from the amended statute that Congress did not intend to diminish the standard, as discussed in Roadway, applicable to Section 1927 sanctions. It appears, moreover, that the amended Section 1927 should be read even more restrictively than it was read by this Court in Roadway in light of the statute's extraordinary

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who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the Court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct."

authorization of attorney fee assessments against attorneys.

It appears, therefore, that the clear analysis of Section 1927 by this Court in Roadway is controlling. In Roadway this Court embraced the purpose of Section 1927 as established by the legislative history and the clear legislative language:

> "Congress in 1853 ... authorized the assessment of costs against dilatory attorneys: '[T]o prevent abuses from ingenious construction, to discourage unnecessary prolixity, old useless forms, and the multiplication of proceedings, and the prosecutions of several suits which might be better joined as one." H.R. Rep. No. 50, 32 Cong., 1st Session, 6 (1852). 447 U.S. at 760 (Emphasis Added).

> "But Section 1927 does not distinguish between winners and losers, or between plaintiffs and defendants. The statute is indifferent to the equities of a dispute and to the values advanced by the substantive law. It is concerned only with limiting the abuse of court processes. Dilatory practices of civil rights plaintiffs are as objectionable as those of defendants."

447 U.S. at 762 (Emphasis Added).

It is clear that this Court narrowly construed the reach of Section 1927 in Roadway and that under this view the Court of Appeals' effort to dilute the Section 1927 standard to embrace alleged negligence on the part of an attorney constitutes the kind of "standardless judicial lawmaking" which was rejected by this Court in Roadway. 447 U.S. at 762. Section 1927 is designed to punish abuse of process and other vexatious, unreasonable conduct and this Court, Petitioners assert, should review this case to reach this important issue.

In the instant case, the Sixth Circuit concluded that Section 1972 sanctions were appropriate in this case because Petitioner Williams had negligently "pursu[ed] claims that he should know are

frivolous." Appendix at 11. The panel further held that bad faith need not be determined to be present, contrary to Roadway, in order to impose sanctions under Section 1927. Id. Petitioners respectfully submit that the "unreasonable" and "vexatious" standard, as construed by this Court, requires, at the very least, a finding of bad faith. There was no such finding by the Court below and, consequently, the decision of the Court of Appeals conflicts with a decision of this Court.

In United States v. Ross, 535 F.2d 346 (6th Cir. 1976), the Sixth Circuit held that "Congress intended to impose a sanction on conduct more culpable than mere uninentional discourtesy to a court when it conjoined he word 'vexatiously' with unreasonably." Webster's Third New

International Dictionary (1971) defines 'vexatious' as 'lacking justification and intended to harass.'" 535 F.2d 349 (Emphasis supplied in Opinion). There, the Sixth Circuit adopted the standard that "the power to impose costs under 28 U.S.C. Section 1927 should e exercised 'only in instances of a serious and studied disregard for the orderly processes of justice.'" Id. (Emphasis Added). The Ross case, supra, has never been overruled by the Sixth Circuit.

In In Re Jacques, 761 F.2d 302 (6th Cir. 1985), the Sixth Circuit upheld sanctions against an attorney under Section 1927 in a situation where an attorney failed to appeal at a trial date rescheduled for his convenience, misrepresented his whereabouts to the Court, and justified his conduct in open

Court by asserting, "[I] had the screaming itches in the crotch... I wasn't here because I would have been scratching my testicles constantly if I had been here." 761 F.2d 305. Although the Sixth Circuit did not discuss the standard under Section 1927, the Court apparently relied upon the clear statutory language in holding that this professional misconduct and disobedience to the trial court's order resetting the case for trial constituted unreasonable and vexatious conduct. No misconduct of this kind has ever been attributed to Petitioner Williams, a highly respected civil rights attorney.

In a concurring opinion, Judge Wellford declined to join in the Section 1927 portion of the Court's affirmance of the civil contempt citation upon the ground

that even this outrageous conduct did not rise to the level of vexatious misconduct:

> "This court previously (and I believe unfortunately) limited the application of [Section 1927] in United States v. Ross, 535 F.2d 346 (6th Cir. 1976). Another court has found that conduct akin to studied disregard for orderly processes of justice be the necessary predicate for imposition of costs thereunder. Kiefel v. Las Vegas Hacienda, Inc., 404 F.2d 1163 (7th Cir. 1968) cert. denied, 395 U.S. 908, 89 S.Ct. 1750, 23 L.Ed.2d 221 (1969). While Jacques disregarded the procedures established by Judge Aldrich, I am not sure his actions 'vexatiously' multiplied the proceedings within the meaning of that statute." 761 F.2d 307.

If follows, therefore, that the decision of the Sixth Circuit was contrary to Roadway, Ross, and the only portion of the In Re Jacques opinion which discusses the liability standard under Section 1927.

In Jones v. Continental Corporation, 789 F.2d 1225 (6th Cir. 1986), however,

the Sixth Circuit, without discussing or citing Ross or In Re Jacques, or discussing the standards set out in Roadway, embraced the following standard for Section 1927:

> "Accordingly, at least when an attorney knows or reasonably should know that a claim pursued is frivolous, or that his or her litigation tactics will needlessly obstruct the litigation of the nonfrivolous claims, a trial court does not err by assessing fees attributable to such actions against the attorney." 789 F.2d at 1230.

In reaching this decision, this Court did not rely upon the statutory language or the statutory history, but merely held that the amendment to Section 1927 after Roadway must have been for the purpose of adding something to the "inherent powers" recognized in Roadway. The amendment, however, Petitioners submit, was for the sole purpose of authorizing the assessment of attorney's fees under 42 U.S.C.

Section 1927 and did not have the effect of diluting the substantive statutory standard. See, e.g., United States v. Carley, 783 F.2d 341, 344 (2nd Cir. 1968).

2. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS CONCERNING THE STANDARD FOR IMPOSING SANCTIONS AGAINST ATTORNEYS UNDER 42 U.S.C. Section 1927.

The Courts of Appeals for other circuits, however, appear to require at least a showing of bad faith before an attorney can be sanctioned under 42 U.S.C. Section 1927. See Sturgeon v. Airborne Freight Corp., 778 F.2d 1154, 1161 (5th Cir. 1985) ("Although plaintiff's appeal is meritless, we do not find it so unreasonable or unjustified to cause us to impose sanctions"); Toombs v. Leone, 777 F.2d 465, 471 (7th Cir. 1985)("Such sanctions are appropriate under Section

1927 when counsel has acted recklessly or in bad faith."); McConnell v. Surak, 774 F.2d 746, 752 (7th Cir. 1985)(bad faith is required under Section 1927); Dallo v. I.N.S.., 765 F.2d 581, 589 (6th Cir. 1985)("An appeal is frivolous if it is obviously without merit and is prosecuted for delay, harassment, or other improper purposes."); United States v. Blodgett, 709 F.2d 608 (9th Cir. 1983)(bad faith is required); Morris v. Adams-Mills Corporation, 758 F.2d 1352 (10th Cir. 1985)(bad faith appears to be required. See footnote 7); Blair v. Shenandoah Women's Center, Inc., 757 F.2d 1435, 1438 (4th Cir. 1985)(subjective bad faith required); Tedeschi v. Barney, 757 F.2d 465 (2nd Cir. 1985)(bad faith is required); Limerick v. Greenwald, 749 F.2d 97, 101-102 (1st Cir. 1984)(Conduct was perilous-

ly close to abuse of process and deemed to have "passed the border of advocacy and entered the realm of harassment"); In Re Oximeter, Inc., 748 F.2d 637 (Fed. Cir. 1984)(frivolous and for the purpose of delay). The decision of the Sixth Circuit in this case clearly involves poorly reasoned judicial lawmaking which is contrary to Roadway and the maxim that punitive statutory provisions be construed restrictively. Mone v. C.I.R., 774 F.2d 570 (2nd Cir. 1985); Badillo v. Central Steel & Wire Co., 717 F.2d 1160, 1166 (7th Cir. 1983).

The Sixth Circuit, moreover, has embraced a negligence standard which is tantamount to affording a party not in privity of contract with Petitioner Williams, the Union, a federal legal malpractice claim against Petitioner

Williams, without affording said Petitioner the protections of a trial by jury and notice pleading. Certainly, this bizarre result is not contemplated by the statute authorizing the extraordinary relief of punitive sanctions. The Sixth Circuit's decision is clearly out of step with the decision of this Court in Roadway and the decisions of the First, Federal, Fourth, Eighth, Ninth, and Tenth Circuits.

In Jones, supra, the Sixth Circuit relied upon the case of Reynolds v. Humko Products, 756 F.2d 469 (6th Cir. 1985) in concluding that the new standard should embraced. In Humko, supra, however, the Court never addressed the question of the standard and merely acknowledged that Section 1927 sanctions and inherent power sanctions were not the same thing.

Petitioners submit that the statutory language of Section 1927 requires even greater culpability than the inherent power sanctions since the attorney's conduct is required to be "vexatious", or intentional harassment, under the statute.

In Jones, moreover, the Sixth Circuit relied upon an isolated reading of two cases from the Fifth and Seventh Circuits, Lewis v. Brown & Root, Inc., 711 F.2d 1287 (5th Cir. 1983) aff'd in part on reconsideration, 722 F.2d 209 (5th Cir.), cert. denied (1984) and Knorr Brake Corp. v. Harbil, Inc., 738 F.2d 223 (7th Cir. 1984). As shown earlier, several other cases from these same circuits appear to require at least a showing of bad faith. McConnell, supra; Sturgeon, supra; Badillo, supra. See also Reid v.

United States, 715 F.2d 1148 (7th Cir. 1983); Freeman v. Local Union No. 155, Chauffeurs, Etc., 746 F.2d 1316, 1322 (7th Cir. 1984); Suslick v. Rothschild Securities Corp., 741 F.2d 1000 (7th Cir. 1984); Hagerty v. Sucession of Clement, 749 F.2d 217 (5th Cir. 1984). Petitioners submit, therefore, that the statutory language, legislative history, and the weight of judicial authority clearly militates against the Sixth Circuit's construction of 28 U.S.C. Section 1927.

The Sixth Circuit's decision posits that good faith conduct can properly be subjected to sanctions under 28 U.S.C. Section 1927. The panel expressly held that liability under 28 U.S..C Section 1927 "does not require a finding of recklessness, subjective bad faith, or conscious impropriety". Appendix at 10.

Conversely, the Code of Professional Responsibility (CPR), which was in effect at the time this case proceeded to trial, imposed a duty upon a lawyer, as to his client and to the legal system "to represent his client zealously within the bounds of the law". Ethical Consideration (E) 7-1. Accordingly, "[w]hile serving as advocate, a lawyer must resolve in favor of his client doubts as to the bounds of the law." EC 7-3. His conduct is within the bounds of the law, and therefore permissible, if the position "taken is supported by the law or is supportable by a good faith argument for an extension modification, or reversal of the law." EC 7-4. (Emphasis Added) Consequently, a lawyer has an ethical obligation to his client and to the Courts to make good faith arguments for an ex-

tension, modification, or reversal of law. The Sixth Circuit's decision, however, erroneously punishes this good faith effort.

EC 7-4 also provides that "a lawyer is not justified in asserting a position in litigation that is frivolous". It appears this provision refers to not merely existing law but that the "position", ie.., the argument for the extension modification, or reversal of existing law, must be totally frivolous in order to invoke this consideration. Similarly, Disciplinary Rule (DR) 7-102(A)(2), furthermore, prohibited a lawyer from "knowingly advanc[ing] a claim or defense that is unwarranted [or frivolous] under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension,

modification, or reversal of existing law." (Emphasis Added). It ap- pears, therefore, that good faith conduct, even in the context of an argument later adjudged to be frivolous, is factored into an attorney's duty to zealously represent his client. The Sixth Circuit's decision, which requires no finding of bad faith, recklessness, or conscious impropriety in pursuing a claim which was clearly known to be frivolous, therefore, is erroneous and contrary to the decision of this Court and of other Circuits.[4]

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[4] The ramifications of punishing good faith mistakes or unsuccessful efforts to argue for the extension, modification, or reversal of existing law becomes even more onerous in the criminal context where the right to counsel guarantee may well be impaired by the Sixth Circuit's standard. Furthermore, in the civil context, reversal of outworn precedent will rarely be attempted under the panel's decision. See, e.g., Garcia

William E. Caldwell, Esquire, an expert witness for the Petitioners, cogently expressed in his Affidavit the ethical concerns raised by the imposition of sanctions against Petitioner Williams in the circumstances of this case:

> " My review of the record in this case leaves me with the firm conviction that Mr. Williams did no more than zealously assert his client's position under the rules of the adversary system. In so doing, it appears that at times he strained Judge Morton's patience, which I suppose to be the common plight of trial judges when cases which they find unpersuasive are being pressed upon them. Pressing a hard case, however, is not synonymous with unreasonably and vexatiously multiplying the proceedings. Even with respect to the most difficult aspect of Mr. William's case -- his client's claim against a white-male-dominated union which had never processed a grievance alleging race or sex discrimination --I do not see how it can be said that he multiplied the

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v. San Antonio Metro Transit Authority, 469 U.S. 528 (1985) (Reversing National League of Cities v. Usery, 426 U.S. 833 (1976).

> proceedings unreasonably and vexatiously. In my opinion, his arguments against the union (Tr. 3-322 through 3-338; Plaintiff's Amended and Corrected Proposed Findings of Fact and Conclusions of Law at 17-20) were nonfrivolous, capable, legitimate--albeit unavailing -- arguments. To hold Mr. Williams personally liable for defendants' counsel fees in the circumstances of this litigation would effectively charge him with the duty of being the judge of his client's case, the role assigned to the Court, rather than her advocate, the role which he rightly assumed and which, in my opinion, he performed in a highly professional manner.
>
> Beyond the direct impact on Mr. Williams, granting defendants' request for fees against him on the facts of this case would have a most unwholesome effect on the ability, already severely limited, of prospective civil rights plaintiffs to secure the services of competent counsel. If a civil rights plaintiff's lawyer must be more than a zealous advocate -- if he must also be the ultimate judge of his client's case, and judge at his personal peril -- then the congressional purpose of encouraging lawyers to undertake such cases will be wholly thwarted."

The Sixth Circuit never discussed this uncontroverted expert proof. The Petitioners respectfully submit, therefore,

that this Court should review this case and reverse the judgment against Petitioner Williams. See Gelco Corp. v. Baker Industries, Inc., 779 F.2d 26 (8th Cir. 1985); Zaldwin v. City of Los Angeles, 780 F.2d 823, 830 (9th Cir. 1986); U.S. v. Associated Convalescent Enterprises, Inc., 766 F.2d 1342, 1346 (9th Cir. 1985); Baker Industries v. Cerberus, Ltd., 764 F.2d 204 (3rd Cir. 1986).[5]

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[5] "This bad faith requirement seems necessary to avoid chilling an attorney's legitimate ethical obligation to represent his client zealously. 764 F.2d 208 (Emphasis Added).

"We too read Section 1927 to require a showing of actual bad faith before attorney's fees may be imposed. If it were otherwise, an attorney who might be guilty of no more than a mistake in professional judgment in pursuing a client's goals might be made liable for excess attorneys' fees under Section 1927." 764 F.2d at 209.

3. THE CONFLICT BETWEEN THE DECISION BELOW AND THE DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS CONCERNS A MATTER OF NATIONAL IMPORTANCE.

The issues presented by the conflict between the Sixth Circuit's decision and the decisions of this Court and other Circuits are important. At the heart of the inquiry is the question of whether lawyers can zealously represent their clients in good faith without a fear that the fulfillment of this ethical obligation will result in sanctions under a statute which expressly prohibits only unreasonable and vexatious conduct. Petitioners submit that these questions are national in scope and should not be subject to piecemeal analysis. Petitioners submit that this Court should fully address the issues presented by the conflicting decisions alluded to herein.

CONCLUSION

For these reasons, therefore, Petitioners asserts this Court should grant their Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 85-5222

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PEARLIE MAI HAYNIE and her counsel, AVON N. WILLIAMS, JR., *Appellants,*

v.

ROSS GEAR DIVISION of TRW, INC., et al., *Appellees.*

ON APPEAL from the United States District Court for the Middle District of Tennessee.

Decided and Filed August 15, 1986

Before: LIVELY, Chief Judge; and MERRITT and NELSON, Circuit Judges.

PER CURIAM. Pearlie Mai Haynie, a sometime factory worker with a history of health problems, was discharged by her employer, the Ross Gear Division of TRW, for chronic absenteeism. Through her union Ms. Haynie filed a grievance under the collective bargaining agreement for the unit of which she was a member, and the dispute was submitted to arbitration. Ms. Haynie, who is black, claimed initially that the company was guilty of racial discrimination, but on the recommendation of the union representative who appeared on her behalf at the arbitration hearing that claim was not

pressed at the hearing. The arbitrator held that Ms. Haynie had been wrongfully discharged, and he ordered that she be reinstated without backpay. She did not return to work because of layoffs occasioned by lack of business.

Engaging Avon Williams, a prominent civil rights lawyer, as her counsel, Ms. Haynie sued both her employer and her union, UAW Local # 342, under 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.*). The case was tried to the court, and the defendant union was dismissed at the conclusion of the plaintiff's proofs. Ross Gear was required to put on a defense, the court believing that Ms. Haynie had established a prima facie case of discrimination against the company, but Ross Gear's proofs convincingly rebutted Ms. Haynie's prima facie case, and the court entered judgment for Ross Gear at the conclusion of all the evidence. The judgment in favor of Ross Gear and the union was affirmed on appeal. The trial court then entered judgment for the union against both Ms. Haynie and Mr. Williams for the union's costs and attorney fees, and entered judgment for Ross Gear against Ms. Haynie alone for the company's costs and attorney fees. We shall reverse the award to Ross Gear, affirm the award to the union as far as Mr. Williams is concerned, and remand for further proceedings with respect to Ms. Haynie.

I

Ms. Haynie, now in her mid forties, has been a factory worker most of her adult life. She has an eighth grade education. She went to work for Ross Gear in 1973 and had an unremarkable work record until February of 1977. At that time she began to experience a variety of health problems, and she absented herself from work, sometimes on doctor's orders and sometimes not, on numerous occasions. After repeated warnings about absenteeism Ross Gear discharged her in January of 1980. The union grievance committee interceded on her behalf, and she was reinstated without loss of

seniority or benefits; but the company impressed on her that if she could not reasonably expect to stay at work when she returned, she should take an extended leave of absence. The company made clear that it did not want to be in the position of having to depend on the attendance of a worker whose attendance could never be counted on. Ms. Haynie did not go on extended leave, and on February 27, 1981, after a further warning about excessive absenteeism and after the passage of some ten months in which the number of days Ms. Haynie worked amounted to less than four weeks, Ross Gear discharged her "for chronic absenteeism due to excessive and extended medical leaves."

Ms. Haynie filed a grievance under the collective bargaining agreement to which Ross Gear was a party, claiming, among other things, that no white employee had ever been discharged for taking excessive medical leaves. The union's grievance committee believed that Ms. Haynie had a legitimate grievance, but found no evidence of racial or gender-based discrimination. Both white and black employees, male and female, had been granted extended medical leaves of absence, an option of which Ms. Haynie had not sought to avail herself.

Prior to the arbitration hearing David Dyer, the area director of the international union, discussed the case with the union committee and with Ms. Haynie and the lawyer who was representing her at that time, J. C. McMurtry. Mr. Dyer expressed a willingness to argue discrimination before the arbitrator, but no one was able to come up with any evidence of discrimination that seemed capable of withstanding scrutiny. It was Mr. Dyer's impression that the most likely reason for Ms. Haynie's discharge was that she had missed a great many "unaccountable" days and seemed to get well enough to return to work whenever her sickness and accident benefits ran out. Mr. Dyer recommended to Ms. Haynie, in the presence of her attorney, that the discrimination claim not be pressed. Mr. Dyer knew that Ms. Haynie had been operated

on for cancer, a disease from which his own wife had died, and he knew that cancer patients could be strong one day and weak the next. He proposed to stress this before the arbitrator, and he told Ms. Haynie that he "wanted to win this case very bad." Ms. Haynie agreed with his proposed approach, and it was also agreed that Mr. Dyer should make the presentation before the arbitrator instead of Mr. McMurtry.

The case was heard by Arbitrator Monroe Berkowitz on September 25, 1981. When the arbitration hearing was over Ms. Haynie told Mr. Dyer that he was one of the best attorneys she had ever seen. On being told that he was not an attorney, she said that she would still want him to represent her in any other cases she might have. Both Ms. Haynie and her lawyer told Mr. Dyer that they did not know how he could have done a better job of representing her.

On January 20, 1982, the arbitrator issued an award holding that Ms. Haynie had been discharged in violation of the collective bargaining agreement. No backpay was awarded, but there is no reason to suppose that the arbitrator would have awarded backpay had the claim of racial discrimination been pressed. Ms. Haynie was not called back to work, but, again, there is no reason to suppose that the situation would have been any different had the racial discrimination claim been pressed.

Ms. Haynie filed charges against Ross Gear and the union with the United States Equal Employment Opportunity Commission on March 18, 1982, and she brought suit in Federal District Court on April 12, 1982. She charged the company with discrimination in terminating her employment, in contesting her grievance, and in refusing to give her backpay. She charged the union with discrimination in failing to complain of discrimination in the grievance proceeding and in failing to render appropriate post-arbitration assistance.

Ross Gear promptly moved for judgment on the grounds that (1) Ms. Haynie had failed to file a charge of discrimina-

tion within 180 days after the date of her discharge, (2) no right to sue notice had been issued, and (3) the action had not been commenced within one year of the date on which the cause of action accrued. The EEOC issued Ms. Haynie a notice of right to sue on June 1, 1982, and the complaint was amended to so allege. The trial court reserved its ruling on Ross Gear's motion, and the case went to trial after both defendants had filed answers denying liability.

The court decided, at the conclusion of the case in chief, that Ms. Haynie had failed to make out a case against the union, and the union was dismissed at that stage. Although Ross Gear renewed its motion for judgment, the court concluded that under *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), the proofs offered by Ms. Haynie were enough to establish a prima facie case of discrimination against Ross Gear, and the court was not persuaded that the statute of limitations necessarily provided a complete defense.

In its memorandum of decision granting judgment in favor of Ross Gear after both sides had presented their evidence and had rested their cases, the trial court concluded that there was no basis for a finding that the 180 day limitation period for filing an administrative charge of discrimination had been equitably tolled, and the court similarly found that there was no basis for concluding that Ms. Haynie was not bound by Tennessee's one year statute of limitations insofar as her claims under 42 U.S.C. § 1981 were concerned. The allegations that the arbitrator's decision had not been properly enforced and that unlawful discrimination had occurred after the arbitration decision were not necessarily time barred, however, and the court therefore reviewed the plaintiff's claims of multi-faceted racial discrimination in some detail.

Characterizing her testimony as "not worthy of credit," the court observed that Ms. Haynie "impressed the court most forcefully as being an individual who was willing to say whatever she might in order to establish a claim." The court said

that Ms. Haynie's claim that her discharge resulted from discrimination rested, in large part, upon the intimation that she had no way of knowing the company was thinking of firing her, and the court found "[h]er memory . . . conveniently sketchy with respect to the subject of warnings about her attendance record." The court considered Ms. Haynie's pattern of behavior "perfectly consistent with what might be expected from an employee who only returned to work for a short time so that she could collect sick leave benefits for another illness," and although the arbitrator eventually concluded that the company was wrong under the collective bargaining agreement, "nothing convince[d] the court that racial considerations underlay the effort to discharge her." The court was in total agreement with the arbitrator's decision not to award backpay: "[i]n view of the attendance record which plaintiff had established up to the time of her discharge, any attempt to set an amount of backpay for her would be founded in rife speculation."

The judgment of the trial court on the merits of Ms. Haynie's case was affirmed, on appeal, by the unanimous vote of a three judge panel of this court. The trial court then received extensive evidence relating to the applications filed by the union and Ross Gear for an award of their costs and attorney fees. The applications were fully briefed and argued, and in a memorandum decision filed on December 4, 1984, the court held Ms. Haynie liable to both the union and Ross Gear. The court declared that the defendants would have been entitled to recover their attorney fees from Ms. Haynie even under the "subjective bad faith" exception to the traditional American rule that each side must bear its own attorney fees, and the court went on to hold that the attorney fees should be borne by Ms. Haynie under 42 U.S.C. § 1988 in any event because her action was frivolous and without foundation and the moving parties were thus entitled to prevail under the test prescribed by *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412 (1978). On the strength, presumably, of the impressions

recorded in its decision on the merits, the trial court said "[t]here is not a doubt in the court's mind that the plaintiff brought this action in an effort to harrass [sic] Ross Gear and Local 342."

The trial court found the case against Mr. Williams, Ms. Haynie's counsel, "more troubling." Ross Gear was held not to be entitled to recover any of its costs and attorney fees from Mr. Williams personally because of the impossibility of separating the cost of defending the discriminatory discharge claim from the cost of defending the company's challenge to Ms. Haynie's grievance. Based on the court's conclusion that there was no colorable claim that the union's conduct had tolled the statute of limitations, however, and its conclusion that the result achieved in the arbitration proceedings was not the product of any improper discrimination on the union's part, the trial court decided that Mr. Williams should be held liable for the union's attorney fees and costs. The court rejected as "groundless" any notion that Ms. Haynie would have been reinstated with backpay if the union had pursued a racial discrimination claim. "The arbitrator refused to award the plaintiff backpay," said the court, "because it would have been the wildest fiction for him to assume that the plaintiff would have been available to work from the time she was discharged until she was reinstated."

The court went on to consider the reasonableness of the fees and costs requested, and decided that the $45.00 per hour requested by the union attorneys represented a very reasonable hourly rate for attorneys of their abilities and experience. Applying that hourly rate to all of the attorney time that was documented, and allowing the costs claimed of $282.50, the court held Ms. Haynie and her counsel jointly and severally liable to the union for $5,844.50. Finding that the attorney fees and costs claimed by Ross Gear were meticulously documented, that the time charged by the company's lawyers had been reasonably and efficiently spent, that the hourly rates they claimed were reasonable for the community,

and that the company's documented costs appeared reasonable, the court held that Ross Gear was entitled to recover a total of $18,287.17 from Ms. Haynie.

The trial court did not inquire into Ms. Haynie's ability to pay a $24,131.67 judgment, beyond noting that her original complaint had alleged that she had the financial wherewithal to maintain a class action. Ms. Haynie moved to alter or amend the judgment, supporting her motion with an affidavit in which she swore that she had pursued her lawsuit because she strongly believed that she was a victim of racial discrimination; that she had not been employed since November 14, 1980; that she had recently married a man who was also unemployed and had lost his disability benefits; that she was receiving food stamps; that her living expenses were paid by a daughter; and that her only assets were a modest home, a few household furnishings, and a 1969 automobile not in operating condition. The affidavit further explained that when she filed her lawsuit Ms. Haynie had not anticipated that she would be out of work so long, the arbitrator having directed that she be reinstated. The motion to alter or amend the judgment was denied, apparently without opinion, as was a motion for relief from the order denying the motion.

II

As far as the award of fees and costs against Ms. Haynie is concerned, the finding that this action was brought in an effort to harass Ross Gear and Local 342 strikes us as clearly erroneous. There was no evidence that Ms. Haynie was motivated by an improper desire to hurt the defendants, as opposed to a straightforward desire to help herself. The latter motive is unexceptionable, under our legal system, and Ms. Haynie having placed herself in the hands of a lawyer described by the trial court as "one of the finest lawyers in Nashville," it is hard for us to see how Ms. Haynie can be faulted for accepting the lawyer's judgment that the case was worth pursuing.

We are not unmindful of the trial court's observations regarding Ms. Haynie's candor, or lack of it, and we suppose that if Diogenes, searching for an honest man, had wandered into the courtroom during the trial of this case, he might not have considered his quest at an end on meeting the plaintiff —although the rough edges on the plaintiff's testimony may have stemmed more from a lack of pre-trial preparation ("sandpapering," in the trial court's terminology) on the part of her badly overworked counsel than from any inherent defect in the plaintiff's character. If Ms. Haynie's reverence for objective fact left something to be desired, however, there is no reason to suppose that she was guilty of the kind of blatant perjury committed in *Price v. Pelka,* 690 F.2d 98 (6th Cir. 1982). The plaintiff there, having prevailed on the merits, was allowed to recover her attorney fees notwithstanding a performance on the witness stand that makes Ms. Haynie's testimony look like a model of exactitude by comparison. Life has not dealt kindly with Ms. Haynie, and although she was wrong in blaming Ross Gear for her troubles, the record of this case does not, to our minds, warrant the conclusion that Ms. Haynie knew for a certainty that she had not been discriminated against.

Even though Ms. Haynie did not bring this action in subjective bad faith, *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 421 (1978), teaches that the court still had discretion to require her to bear the prevailing defendants's attorney fees, under 42 U.S.C. § 2000e-5(k), if her action was "frivolous, unreasonable, or without foundation." The trial court found, however, that Ms. Haynie had made out a *prima facie* case of discrimination against Ross Gear, and we are at a loss to understand how a case that is strong enough to withstand a motion for judgment at the conclusion of the plaintiff's proofs can be considered "frivolous, unreasonable, or without foundation." We have held heretofore that where one of the plaintiff's claims is non-frivolous, the defendant's attorney fees may not be shifted to the plaintiff even though others of the plaintiff's claims are patently without merit.

Tarter v. Raybuck, 742 F.2d 977, 987-88 (6th Cir. 1984), *cert. denied*, _ U.S. _, 105 S.Ct. 1749 (1985). We believe the trial court abused its discretion in holding Ms. Haynie responsible for Ross Gear's attorney fees and costs.

We find no such abuse of discretion as far as the union's costs and fees are concerned. The union did exceedingly well by Ms. Haynie. The union's international representative was obviously sympathetic toward her, notwithstanding the thinness of her claim, and the approach he followed before the arbitrator—to very good effect—was specifically discussed with and approved in advance by Ms. Haynie and her lawyer. The union's post-arbitration assistance left nothing to be desired. Ms. Haynie was unable to make a *prima facie* case against the union because no such case existed. We believe Ms. Haynie's claim against the union was totally baseless, and whatever her subjective state of mind may have been with respect to the union, the statute gave the trial court discretion to require that Ms. Haynie bear the union's costs and attorney fees.

As to Mr. Williams, the question under 28 U.S.C. § 1927 is whether he "multiplie[d] the proceedings . . . unreasonably and vexatiously." An affirmative answer to that question does not require a finding of recklessness, subjective bad faith, or conscious impropriety; an attorney does not have *carte blanche* to burden the federal courts by pursuing claims that he should know are frivolous (see *Jones v. Continental Corp.*, 789 F.2d 1225 (6th Cir. 1986)), and we cannot say that the trial court was clearly wrong in finding that Mr. Williams did just that in pursuing the claim against the union.

If Ms. Haynie's financial situation were such as to make it reasonable for the union's expenses to be borne by Ms. Haynie and Mr. Williams jointly, we would not be disposed to interfere with either branch of the court's judgment regarding the union's fees and costs. The papers available to us, however, do not indicate the basis on which the court rejected Ms. Haynie's motion to alter or amend the judgment, and

it would be helpful for us to know the trial court's thinking on this.

Accordingly, the judgment is REVERSED insofar as it imposes liability on Ms. Haynie for Ross Gear's costs and attorney fees, AFFIRMED insofar as it imposes liability on Mr. Williams for the union's costs and attorney fees, and VACATED insofar as it imposes liability on Ms. Haynie for the latter costs and fees. The cause is REMANDED to the district court for further consideration of the question whether Ms. Haynie should be relieved from liability, in whole or in part, because of the facts set forth in her affidavit. Each party to this appeal shall bear his own costs on appeal.

Filed Nov. 4, 1986

No. 85-5222

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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ORDER

==========

PEARLIE M. HAYNIE,

Plaintiff-Appellant,

AVON N. WILLIAMS, JR.,

Attorney-Appellant,

v.

TRW ROSS GEAR DIVISION, ETC.,

Defendant-Appellee

BEFORE: LIVELY, Chief Judge, MERRIT and NELSON, Circuit Judges

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no

judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THIS COURT

s/s_____
John P. Hehman, Clerk

Filed Dec. 4, 1984

No. 82-2037-M

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

==========

PEARLIE MAI HAYNIE

v.

ROSS GEAR DIVISION OF T.R.W., INC., and UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 342

==========

MEMORANDUM

This matter is once again before the court upon the prevailing defendants' applications that their costs and attorneys' fees be assessedagainst the plaintiff and her attorney. See 28 U.S.C. § 1927; 42 U.S.C. § 1988; 42 U.S..C § 2000e-5(k). For the reasons set

forth below, the defendants' applications shall be granted in part and denied in part.

The facts of this case are described fully in prior memoranda of this court. Those relevant to this proceeding need only be briefly repeated here. The plaintiff was discharged from her job with Ross Gear Division of T.R.W., Inc. (Ross Gear) on February 27, 1981, for excessive absenteeism. Her union filed a grievance on her behalf that culminated in an arbitration award reinstating her without backpay. Ross Gear abided by that arbitration decision fully.

On March 18, 1982, the plaintiff, through her attorney, filed an E.E.O.C charge of racial and sexual discrimination against Ross Gear and the United Automobile, Aerospace & Agricultural

Implement Workers of America, Local 342 (Local 342). She filed the present action on April 12, 1982, claiming that the defendants had violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. S 2000e, et seq., and 42 U.S.C. § 1981. Specifically, the plaintiff alleged that Ross Gear had terminated her employment, challenged her grievance, and refused to give her backpay because of her race and sex. As for Local 342, she alleged that it had discriminated against her by failing to raise a claim of racial discrimination in her grievance proceedings, by not attempting to recover backpay for her after arbitration, and by failing to inform her of the fact that it had discriminated against her. The plaintiff further alleged that Ross Gear had defamed her by stating that it could

not count on her as a full-time workers and that she was unfit for industrial work. She claimed Local 342 was liable for these defamatory comments because it acquiesced in them.

In addition to her personal claims, the plaintiff sought to represent a class of past, present and future black and black female employees of Ross Gear and all past, present and future black and black female members of Local 342. On behalf of the proposed class, the plaintiff charged that the defendants discriminated against class members by failing to hire a representative number of blacks or black females at all levels of employment; by restricting the advancement of class members through racial discrimination in initial job placement, promotion job assignment, on-the-job

training, wages, disciplinary matters, discharge, and other conditions of employment; by subjective evaluation techniques; and by Local 342's failure to prosecute grievances against Ross Gear for racial discrimination against class members. The plaintiff's request for class certification was denied when she failed to introduce evidence showing the requisite commonality between her individual claims and those of the class she sought to represent. See General Telephone Company of the Southwest v. Falcon, 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982).

The plaintiff's individual claims proceeded to trial. Local 342 was dismissed at the end of the plaintiff's proof. Ross Gear briefly presented one witness on its behalf. Judgment was en-

tered for both Local 342 and Ross Gear on all issues. The defendants subsequently petitioned the court to assess their costs and attorneys' fees against the plaintiff and her lawyer. The plaintiff argued that this court lacked jurisdiction to make such an award since the case was on appeal to the Sixth Circuit. On October 30, 1984, the Sixth Circuit affirmed the judgment of this court as to the merits of the plaintiff's claims, Haynie v. T.R.W. Ross Gear Division, No. 83-5622 (6th Cir. October 30, 1984); thus the jurisdiction issue raised by the plaintiff is now moot.

As for the plaintiff herself, the court would award attorneys' fees against her under the traditional "bad faith" exception to the "American" rule, see Alyeska Pipeline Service Company v. The

Wilderness Society, 421 U.S. 240, 258-59, 95 S.Ct. 1612, 44 L.Ed.2d 141, 154 (1975), so obviously she is liable for the defendants' costs and fees under the more lenient "frivolous or groundless" test. See Christiansburg Garment Co. v E.E.O.C., 434 U.S. 412, 421-11, 98 S.Ct. 694 54 L.Ed.2d 648, 657 (1978). There is not a doubt in the court's mind that the plaintiff brought this action in an effort to harass Ross Gear and Local 342.

The case against plaintiff's counsel is more troubling. At the time he filed this suit, plaintiff's counsel knew or should have known that the statute of limitations had run on his client's Title VII and § 1981 claims for wrongful discharge. See 42 U.S.C. § 2000e-5(e); Tenn. Code Ann. § 28-3-104. He argued,

however, that the limitation periods should be tolled because of fraudulent concealment. Counsel alleged this concealment consisted of Local 342 telling the plaintiff that it was investigating a claim of racial discrimination on her behalf, when in fact it did not do so. This theory was totally frivolous for two reasons. First, it was belied by his client's own testimony. At trial, the plaintiff testified that she felt from the very beginning that she had been fired because of her race. Yet, she made no mention of her feelings at her arbitration hearing, nor did she object to Local 342's failure to press a claim of racial discrimination. Second, an attorney of plaintiff's counsel's experience and expertise must have known that whatever went on in the grievance proceedings

had absolutely no effect on his client's civil rights. See International Union of Electrical, Radio and Machine Workers, AFL-CIO, Local 790 v. Robbins & Myers, Inc., 429 U.S. 229, 97 S.Ct. 441, 50 L.Ed.2d 427 (1976). The grievance proceedings only provided a forum in which the plaintiff could vindicate her contract rights, not her civil rights. Id. U.S. at 240 n.14.

Plaintiff's counsel also advanced the theory that Local 342's and Ross Gear's handling of the plaintiff's grievance evidenced a continuing practice of discrimination on their part. As for Local 342, it won for the plaintiff. Though he does not say so explicitly, plaintiff's attorney seems to suggest that his client would have been reinstated with backpay had Local 342 pursued a claim of racial

discrimination. Counsel's suggestion is groundless. The arbitrator refused to award the plaintiff backpay because it would have been the wildest fiction for him to assume that the plaintiff would have been available to work from the time she was discharged until she was reinstated. Counsel's claim against Ross Gear on this score was a closer matter. He alleged that Ross Gear zealously contested his client's grievance while it compromised those of whites with similar or worse employment records. In support of this claim, he pointed to the cases of John Farley, Mary K. Howard, and Ann White, all of whom were white. Although Ross Gear convincingly rebutted the inference of discrimination raised by those cases, they were enough to establish a prima facie case of discrimination. See

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668, 677 (1973). Having established that much, plaintiff's attorney was obviously justified in attempting to discover and prove past acts of discrimination to support a finding that discriminatory intent was the reason his client was treated differently from the three whites named above. Thus, despite the fact that the plaintiff's discriminatory discharge claim was time barred, the evidence allegedly supporting it was nevertheless admissible. It if were possible to separate the hours Ross Gear's lawyers spent defending the discriminatory discharge claim from those they spent defending their client's challenge to the plaintiff's grievance, the court would assess the hours spent working on

the first claim against plaintiff's counsel personally. In the court's opinion, however, the evidence supporting both claims is so inextricably intertwined that it would be impossible to make such a division fairly. Consequently, Ross Gear is not entitled to recover any of its costs and attorneys' fees from plaintiff's counsel personally.

In summary, plaintiff and her counsel are jointly and severally liable to Local 342 for its reasonable costs and attorneys' fees.

The court shall now determine whether the fees and costs requested are reasonable. See Hensley v. Eckerhart, ___ U.S. ___, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983); Northcross v. Board of Education of Memphis City Schools, 611 F.2d 624 (6th Cir. 1979), cert. denied, 447 U.S.

911, 100 S.Ct. 2999, 64 L.Ed.2d 862 (1980).

Local 342 has applied for $8,082.00 in attorneys' fees and $1,229.37 in costs. The three attorneys who worked on this case for Local 342 claim to have spent 183.6 hours working on it; however, the documentation submitted to support their claim lists only 123.6 hours. The court cannot compensate parties for hours claimed without some supporting documentation. Those 123.6 hours which are documented appear to have been reasonably and efficiently spent. All three attorneys seek compensation at the rate of $45 per hour. This is very reasonable hourly rate for attorneys of their ability and experience. As with its application for reimbursement of services, Local 342's documentation does not

support its request for costs. Local 342's supporting documents justify an award of $282.50 in costs. In summary, Local 342 is entitled to recover $5,562in attorneys' fees and $282.50 in costs for a total award of $5,844.50. Plaintiff and her counsel shall be jointly and severally liable to Local 342 for this amount.

Ross Gear has applied for attorneys' fees in the amount of $17,367.00 and costs of $929.17. These fees and costs are meticulously documented. Ross Gear's lead counsel spent 127.4 hours working on this case, all of which appear to have been reasonably and efficiently spent. He seeks compensation for 29.3 of those hours at the rate of $115 an hour. He seeks compensation for the remaining 98.1 hours at the rate of $120. Given coun-

sel's experience and skill regarding matters of labor law, these rates are reasonable for the community in which this case was filed. Associate counsel for Ross Gear spent 41.9 hours working on this case. Ross Gear paid her $60 an hour for 7.3 of those hours and $70 an hour for the remainder of her time. The time spent by her was reasonable. The rates at which she was paid were reasonable for associates with her background and experience practicing in firms of the size and reputation of that to which she belongs. Finally, Ross Gear's documents reflect that $29.50 was paid for .8 hours spent by paralegals on this case. By the court's evaluation, Ross Gear's documentation would entitle it to recover $18,031.00 in attorneys' fees. However, since Ross Gear's counsel has averred

that his client was only charged $17,367.00 in attorneys' fees, this lesser amount shall be assessed against the plaintiff. Ross Gear has requested reimbursement for $929.17 in costs. Its documents only show $920.17 in costs. All those costs appear to be reasonable expenses incurred at a fair price. In summary, Ross Gear is entitled to recover $18,287.17 in fees and costs from the plaintiff.

The court realizes that the accompanying order assesses some substantial fees against the plaintiff. However, there is no evidence in the record which would support a finding that the plaintiff is unable to pay this judgment. To the contrary, her original complaint alleged that she had the financial wherewithal to maintain a class action. If in fact the

plaintiff is unable to satisfy the judgment against her, the court assumed her attorney will inform her of the avenues of relief available to her. See e.g., Fed. R. Civ. P. 59(a).

An appropriate order shall be entered.

s/s_____
L. CLURE MORTON
SENIOR U.S. DISTRICT JUDGE

Filed Dec. 4, 1984

No. 82-2037

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

==========

PEARLIE MAI HAYNIE

v.

ROSS GEAR DIVISION OF T.R.W. INC., and UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 342

==========

ORDER

==========

In accordance with the memorandum filed herewith, it is ordered:

(1) that judgment be entered against Pearlie Mai Haynie and Avon N. Williams, Jr., jointly and severally, in favor of United Automobile, Aerospace & Agricul-

tural Implement Workers of America, Local 342, in the amount of $5,844.50; and

(2) that judgment be entered against Pearlie Mai Haynie in favor of Ross Gear Division of T.R.W., Inc., in the amount of $18,287.19.

s/s_____
L. CLURE MORTON
SENIOR U.S. DISTRICT JUDGE

Statutes Involved

1. 42 U.S.C., Section 1927 (1948)

Counsel's Liability for Excessive Costs

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs.

2. 42 U.S.C., Section 1927 (1980).

Counsel's Liability for Excessive Costs

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Supreme Court, U.S.
FILED
MAR 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1408

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PEARLIE MAI HAYNIE, and her counsel,
AVON N. WILLIAMS, JR., ESQUIRE,
Petitioners,

v.

ROSS-GEAR DIVISION OF TRW, INC. and
UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL
IMPLEMENT WORKERS OF AMERICA, LOCAL 342,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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Ethical Consideration 7-1 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1408

PEARLIE MAI HAYNIE, and her counsel,
AVON N. WILLIAMS, JR., ESQUIRE,
Petitioners,

v.

ROSS-GEAR DIVISION OF TRW, INC. and
UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL
IMPLEMENT WORKERS OF AMERICA, LOCAL 342,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 342, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking to review the Sixth Circuit's opinion in this case. That opinion is reported at 799 F.2d 237.

REASONS WHY THE WRIT SHOULD BE DENIED

I. The Decision Below Is In Conformity With This Court's Decision In *Roadway Express v. Piper*, 447 U.S. 752 (1980).

Petitioner contends that the decision of the Sixth Circuit in this case assessing attorney's fees under 28 U.S.C. § 1927 is contrary to this Court's decision in *Roadway Express v. Piper*, 447 U.S. 752 (1980) for the reason

that *Roadway* required a showing of bad faith. Respondent contends that this reading of *Roadway* is erroneous.

The *Roadway* decision involved the issue of whether or not a court could assess attorney's fees against counsel under 28 U.S.C. § 1927 (as it was worded in 1980) or under the inherent powers of the Court. The Court found that § 1927 only allowed the assessment of excess costs against an attorney who acted unreasonably and vexatiously and that attorney's fees were not authorized as "costs" under § 1927 as it then existed. Further, the Court found that neither the attorney's fees provision available to prevailing parties under 42 U.S.C. § 1988 nor 42 U.S.C. § 2000(e)-5(k) changed this result.

After making the finding that only excess costs were allowable under § 1927 rather than attorney's fees, this Court then considered whether a court could assess attorney's fees as a sanction against recalcitrant counsel under the Court's inherent powers. The Court found that it could award attorney's fees under its inherent powers where there was a showing that counsel's conduct "constituted or was tantamount to bad faith." *Roadway Express, Inc., supra,* 447 U.S. at 767. Since the Court below in *Roadway* had not made a specific finding that counsel's conduct constituted bad faith, this Court remanded the case to the District Court for a decision on that issue. However, this Court affirmed the award of costs under the then existing 28 U.S.C. § 1927, admittedly, in the absence of a specific finding of bad faith.

Following petitioner's argument to its logical conclusion would result in a finding that bad faith is required to assess attorney's fees against counsel under § 1927 though the words "bad faith" do not appear in the statute. Section 1927 allows the court to assess attorney's fees against a counsel who "multiplies the proceedings in any case unreasonably and vexaciously . . ."

Contrary to petitioner's assertions, we have been unable to locate anywhere in the Sixth Circuit's Opinion where the Sixth Circuit indicated that petitioner had "negligently" pursued claims that he should know are frivolous. A reading of the Opinion indicates that the Sixth Circuit merely found that where an attorney pursues claims that he should know are frivolous, his conduct multiplies the proceedings unreasonably and vexaciously.

Petitioner painfully attempts to distinguish *Jones v. Continental Corp.*, 789 F.2d 1225 (6th Cir. 1986) (relied upon by the Court below as authority for assessing attorney's fees under 28 U.S.C. § 1927). In doing so, petitioner admits that the September, 1980 Amendments to § 1927 were for the sole purpose of authorizing the assessment of attorney's fees. This is precisely what the *Jones* case meant when it held:

> The effect of the amendment was to nullify that part of *Roadway Express* which held that former § 1927 permitted assessment against losing attorneys only of 'costs', not of attorney's fees, thus adding a statutory power to the 'inherent power' recognized in *Roadway Express*. [Citations omitted].

789 F.2d at 1229. Since *Roadway* refused to grant attorney's fees as costs under the then existing § 1927, approximately three months after the issuance of the *Roadway* decision Congress amended § 1927 to allow for the assessment of attorney's fees.[1] Respondent contends

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[1] The legislative history makes clear that the September 12, 1980 amendment was intended to "expand [] the category of expenses the judge might require an attorney to satisfy personally to include '. . . attorneys' fees.'" Joint Explanatory Statement of the Committee of Conference, 96th Cong., 2d Sess. of reprinted in 1980 U.S. Code Cong. & Ad. News 2781, 2782; see also, *Lewis v. Brown & Root, Inc.*, 711 F.2d 1287, 1289, 1292 (5th Cir. 1983) (upholding award of attorneys' fees under § 1927 against plaintiff and his attorney jointly and severally), *cert. denied*, —— U.S. ——, 104 S.Ct. 975, 79 L.Ed.2d 213 (1984), *modified* 722 F.2d 209 (per curiam) (remanding for trial court to determine whether

that the Sixth Circuit's decision in *Jones* was logical and correct in light of the *Roadway* decision's affirmance of the attorney's fee award under 28 U.S.C. § 1927.

II. The Decision Below Adopts The Prevailing Rule On Imposing Sanctions Against Attorneys Under 28 U.S.C. § 1927.

Petitioner contends that the decision below conflicts with Courts of Appeals of other circuits which allegedly require a showing of bad faith before an attorney can be sanctioned under 28 U.S.C. § 1927. However, the cases cited in petitioner's argument only evidence one circuit which definitely requires a bad faith showing for assessment of attorney's fees under § 1927 and one other circuit which equates frivolous filings with bad faith conduct.

In *United States v. Blodgett*, 709 F.2d 708 (9th Cir. 1983), the issue before the Ninth Circuit was under what circumstances could the court impose monetary sanctions on an attorney for filing a frivolous appeal. The Court found that the imposition of sanctions under 28 U.S.C. § 1927 required a finding that counsel acted recklessly or in bad faith. This position of the Ninth Circuit was reconfirmed in *Tooms v. Leone*, 777 F.2d 465, 471 (9th Cir. 1985).

The Seventh Circuit has also adopted a bad faith standard for assessing attorney's fees against counsel under § 1927. In *McConnell v. Shurak*, 774 F.2d 746 (7th Cir. 1985), the Court held that in order to assess attorney's fees for a frivolous appeal under Rule 38 or § 1927, the Court must first determine whether the appeal was frivolous and then whether the appellant's counsel's persistence in pursuing the litigation is itself

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attorneys' fees for entire proceeding or just a portion of it should be awarded); *cert. denied*, —— U.S. ——, 104 S.Ct. 2690, 81 L.Ed.2d 884 (1984).

evidence of bad faith. The *McConnell* decision relied on *Trecker v. Scag*, 747 F.2d 1176 (7th Cir. 1984), cert. den., —— U.S. ——, 105 Sup.Ct. 2140, 85 L.E.D. 2d 498 (1985). However, it is interesting to note that the Court in *Trecker, supra,* found that persistence in the litigation is itself evidence of bad faith. Therefore, respondent contends that although the standard in the Seventh Circuit may require a finding of bad faith for assessment of attorney's fees against counsel under § 1927, the standard for determining bad faith is extremely low since mere persistence in the frivolous litigation, itself, may be evidence of bad faith.

Several of those cases cited by petitioner for the prop osition that bad faith is required to assess attorney's fees under § 1927 simply do not stand for this proposition. In *Limerick v. Greenwald*, 749 F.2d 97, 101-102 (1st Cir. 1984), the Court held that the manner in which counsel conducted the appeal so unreasonably multiplied the proceedings as to justify the imposition of attorney's fees against them personally. There was no mention in the decision of the requirement of a finding of bad faith.

In *Blair v. Shenandoah Women's Center, Inc.*, 757 F.2d 1435, 1436 (4th Cir. 1985), although the Court found that plaintiff's counsel had engaged in subjective bad faith conduct, the decision does not require a finding of subjective bad faith conduct under 28 U.S.C. § 1927. Moreover, the Court refused to disturb the District Court's finding that it "has inherent power to assess attorney's fees against an attorney, which power is not limited to cases filed in bad faith, but includes actions leading to the filing of suit and includes conduct during the course of litigation." See, 757 F.2d at 1436.

Petitioner also cites *Tedeschi v. Barney*, 757 F.2d 465 (2d Cir. 1985). The Second Circuit in *Tedeschi* affirmed the decision of the District Court finding that counsel had engaged in bad faith conduct. Although defendants

moved for attorney fees under Rule 11, Fed.R.Civ.P., § 1927 and the inherent equitable powers of the Court, the District Court had previously found bad faith. The Second Circuit merely recited the inherent powers rule addressed in *Roadway* and did not address the issue of bad faith under 28 U.S.C. § 1927.

In *Morris v. Adams Millis Corp.*, 758 F.2d 1352 (10th Cir. 1985), although the Court found that plaintiff's counsel had engaged in bad faith conduct, the Court noted at footnote 7 of the Opinion (see, 758 F.2d at 1357, note 7) that it is well-established that courts have the inherent power to impose sanctions on both litigants and attorneys to, *inter alia*, deter frivolous filings. The Tenth Circuit read *Roadway, supra*, to hold that "*apart from § 1927*, the Federal Courts have the inherent power to award attorney fees against counsel personally when the Court has found that the attorney acted in bad faith." [Emphasis added]. 758 F.2d at 1358, note 7.

In *In Re: Oximetrix, Inc.*, 748 F.2d 637 (Fed.Cir. 1984), the Federal Circuit, in assessing attorney's fees against plaintiff's counsel under 28 U.S.C. § 1927, found that plaintiff never had a basis for removal and that competent counsel would have not possibly failed to recognize this fact. The Court further found that plaintiff's petition for mandamus was frivolous and interposed for the purpose of delay. As a result of this finding, the Court assessed attorney's fees jointly and severally against plaintiff and counsel. The words, "bad faith," were not mentioned in the decision.

Finally, petitioner cites *Sturgeon v. Airborne Freight Corp.*, 778 F.2d 1154 (5th Cir. 1985) for the proposition that bad faith is required to impose § 1927 sanctions. However, the Court in *Sturgeon* reasoned that sanctions on appeal are assessed "when the claim advanced is unreasonable, or is not brought with a reasonable good faith belief that it is justified. An appeal is frivolous when it

involves legal points that are not arguable on their merits." 778 F.2d 1161-1171. The Court adopted an "unreasonable and unjustified" standard rather than a "bad faith" standard.

In summation, we read only one and possibly two Circuit Courts of Appeals to require a bad faith finding for the assessment of attorney fees under § 1927. We have been unable to locate any other circuits requiring a finding of bad faith over and above the plain statutory language which merely requires a showing of unreasonableness and vexaciousness.

III. The Decision Below Does Not Conflict With Counsel's Ability To Comply With The Code Of Professional Responsibility, Nor Is It A Matter Of National Importance.

Petitioner submits that the Code of Professional Responsibility required him to "represent his client zealously within the bounds of law." Ethical Consideration 7-1. Although Ethical Consideration 7-1 requires an attorney to represent his client zealously, the section qualifies this zealous representation by requiring that the representation be "within the bounds of the law." Therefore, respondent contends that once petitioner's conduct contravened 28 U.S.C. § 1927 (a federal statute), it ceased to be zealous representation and became outside of the bounds of law. Since the Court below found that plaintiff's case was frivolous and that plaintiff's counsel knew or should have known this fact, his conduct in pursuing this case was outside of the bounds of law.

Finally, respondent contends that 28 U.S.C. § 1927 is a provision which was enacted to allow courts to govern the conduct of attorneys practicing before them. It is difficult to imagine how this Court could set a standard governing conduct under that statute which would be clearer than the plain meaning of the statute. Respondent contends that Courts in the Sixth Circuit should be able

to control members of their bar who should be aware of the standards of conduct within their Circuit. Therefore, a uniform or national decision regarding 28 U.S.C. § 1927, we think, is unnecessary given the need for courts to control their own attorneys, the unambiguous language of the statute, and the variety of fact patterns which can only be determined on a case by case basis.

CONCLUSION

For these reasons, the Petition for Writ of Certorari should be denied.

Respectfully submitted,

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APPENDIX

STATUTES INVOLVED

1. 28 U.S.C., Section 1927 (1948).

Counsel's Liability for Excessive Costs

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the Court to satisfy personally such excess costs.

2. 28 U.S.C., Section 1927 (1980).

Counsel's Liability for Excessive Costs

Any attorney or other persons admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.